Supreme Court, U.S.
FILED

03 265 AUG 14 2003

No.

In The
Supreme Court of the United States

Teresa and Larry Frakes,

Petitioners

v.

Precision Tune, Inc.,
John Garies, William Grimaud,
and Grimaud Enterprises, Inc.

Respondents

On Petition for Writ of Certiorari
To The Supreme Court of Alabama

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI

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11 PP

IN THE SUPREME COURT OF ALABAMA

May 16, 2003

1020856

Ex parte Lawrence W. Frakes and Teresa K. Frakes. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: Lawrence W. Frakes and Teresa K. Frakes v. John Garies, William Grimaud, Grimaud Enterprises, Inc., and Precision Tune, Inc.) (Madison Circuit Court: CV-97-2126; Civil Appeals: 2010922).

CERTIFICATE OF JUDGMENT

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied for noncompliance with Rule 39 (d) (3), Alabama Rules of Appellate Procedure.

NO OPINION.

WOODALL, J. - Moore, C.J., and Houston, Lyons, and Johnstone, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 16th day of May, 2003

s/ Robert G. Esdale, Sr.

Clerk, Supreme Court of Alabama

FEB 14 2003

STATE OF ALABAMA - - JUDICIAL DEPARTMENT
THE COURT OF CIVIL APPEALS
OCTOBER TERM, 2002-2003

2010922

Lawrence W. Frakes and Teresa K. Frakes v. John Garies, William Grimaud, Grimaud Enterprises, Inc., and Precision Tune, Inc.
Appeal from Madison Circuit Court (CV 97-2126).

PITTMAN, Judge.

AFFIRMED. NO OPINION.

See Rule 53(a) (1) and (a) (2) (A), Ala. R. App. P.; Ex parte Boshell, 805 So. 2d 675 (Ala. 2001); Ex parte CTB, Inc., 782 So. 2d 188 (Ala. 2000); O'Brien Eng'g Co. v. Continental Machines, Inc., 738 So. 2d 844 (Ala. 1999); Ex parte R.B.Z., 725 So. 2d 257 (Ala. 1997); Ex parte Till, 599 So. 2d 871 (Ala. 1992); and Ex parte Ben-Acadia, Ltd., 566 So. 2d 486 (Ala. 1990).

Yates, P.J. , and Crawley and Thompson, JJ., concur.

Murdock, J., ***dissents.***

John H. Wilkerson, Jr., Clerk of the Court of Civil Appeals of Alabama, do hereby certify the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said court.

Witness my hand this 14th day of February, 2003

s/ John H. Wilkerson, Jr.

Clerk, Court of Civil Appeals of Alabama

IN THE CIRCUIT COURT
FOR MADISON COUNTY, ALABAMA

Civil Action No. CV97-2126-LWH

LAWRENCE W. FRAKES, and	)
TERESA K. FRAKES,	)
Plaintiffs,	)
	)
	)
v.	)
	)
JOHN GARIES, WILLIAM GRIMAUD,	)
GRIMAUD ENTERPRISES, INC., and	)
PRECISION TUNE, INC.,	)
Defendants.	)

AMENDED ORDER OF DISMISSAL

This cause comes before the Court on the Second Amended Motion to Dismiss of Defendant Precision Tune, Inc. ("Precision Tune") and the Second Amended Motion to Dismiss of Defendants John Garies ("Garies"), William Grimaud ("Grimaud") and Grimaud Enterprises, Inc. ("Grimaud Enterprises"). The Court having considered the motions, all evidence and other matters properly before the Court, app0licable legal authorities, and the arguments and presentation of counsel for the parties, is of the opinion that the Second

Amended Motion to Dismiss of Precision Tune and for Second Amended Motion to Dismiss of Garies, Grimaud and Grimaud Enterprises are due to be granted. Consistent therewith, the Court, in the exercise of its discretion, hereby makes the following findings and enters the following order:1. This action was instituted by the filing of the Complaint by Lawrence W. and Teresa K. Frakes, (the "Frakes") on October 31, 1997. The Frakes subsequently amended their original Complaint, filing an Amended Complaint and Second Amended Complaint on November 19, 1997, and May 13, 1998, respectively. In their original Complaint, the Frakes asserted claims against the named Defendants for fraud, breach of contract, civil conspiracy and claims under the Alabama Deceptive Trade Practices Act, *Ala. Code § 8-19-1, et seq. (1975).* These claims relate directly to and/or arise out of the Franchise Agreement executed by Lawrence W. Frakes in Leesburg, Virginia, at the corporate headquarters for Precision Tune, Inc., on November 30, 1994, and the alleged breach of that Agreement. (*See* Franchise Agreement attached as Exhibit "A" to Precision Tune's Second Amended Complaint) Paragraph 25.2 of the Franchise Agreement between Mr. Frakes and Precision Tune provides:

> **The parties agree that any action brought by either party against the other in any court, whether federal or state, shall be brought within the Commonwealth of Virginia in the judicial district in which**

> **the Franchisor has is principal place of business and do hereby waive all questions of personal jurisdiction or venue for the purpose of carrying out this provision.**

(*See* Franchise Agreement). Until July of 1997, such outbound forum selection clauses were not enforceable in Alabama. *See Professional Insurance Corp. v. Sutherland*, 700 So2d 1154 (Ala. 1996). In *O'Brien Engineering Co. v. Continental Machines, Inc.*, 738 So2d 884, 847 (Ala. 1999), the Alabama Supreme Court recognized that outbound forum selection clauses constituted clauses which deprived courts of their subject matter jurisdiction. On July 28, 2000, the Alabama Supreme Court altered its approach to outbound forum selection clauses, instructing courts that such clauses invoke considerations of venue, not subject matter jurisdiction, as previously determined by the Court. *See Ex parte CTB*, 2000 WL 1038169 (Ala. 2000).

2. The above-quoted forum selection clause is both valid and reasonable and, as such, is enforceable as a matter of law. The only evidence presented to the Court on the issues related to the forum selection clause constituted the evidence presented by Precision Tune. This evidence demonstrated that Lawrence W. Frakes acknowledged his agreement to the terms and conditions of the Agreement as well as the risks resulting from entering into this Agreement. Furthermore, the

evidence demonstrated that the chosen forum is not seriously inconvenient for several reasons, including the fact that the chosen forum constitutes the corporate headquarters of Precision Tune. In response to the evidence presented by Precision Tune, the Frakes failed to present any evidence in response to the Second Amended Petition to Dismiss filed on behalf of Precision Tune. Such deficiency in evidence included the absence of any evidence demonstrating that the outbound forum selection clause in question was affected by fraud, undue influence or overweening bargaining power. Furthermore, there is no evidence that the enforcement of the outbound forum selection clause would be unreasonable on the basis that the chosen forum would be serious inconvenient. Therefore, the Frakes failed to provide any evidence establishing the unreasonableness and/or unfairness of the forum selection clause in question. Accordingly, the Frakes' claims against Precision Tune are due to be dismissed on the basis that Madison County, Alabama, is not the proper venue for this action and any such action should be instituted in Loudown County, Virginia.

3. The Court also holds that the Frakes' claims against Grimaud Enterprises, Grimaud and Garies are due to be dismissed on the ground of *forum non conveniens*. Grimaud Enterprises, Grimaud and Garies presented substantial evidence establishing that Loudoun County, Alabama, constituted the situs of the Frakes' claims. The Frakes did not present any evidence

rebutting the evidence presented by Grimaud Enterprises, Grimaud and Garies. The Court recognizes that, because of the dismissal of Precision Tune form this action and the resulting burden upon the Frakes in maintaining two separate actions in two different venues, which arise out of the same transaction and occurrence, it would be less burdensome upon the Frakes to pursue their claims against all of the named defendants in one venue, Loudoun County, Virginia. It is in the best interest of the parties, witnesses and judicial economy that the parties litigate this action in Loudoun County, Virginia. Furthermore, Grimaud Enterprises, Grimaud and Garies have represented to the Court that they will not to object or raise the defenses of lack of jurisdiction, improper venue and/or statute of limitations upon the reassertion of the claims asserted in the present action in Loudown County, Virginia. These parties are therefore judicially estopped from doing so should an action be initiated in Loudown County, Virginia, reasserting the causes of action specifically contained in the present action, pending in Madison County, Alabama. Based upon the foregoing, the Frakes' claims against Grimaud Enterprises, Grimaud and Garies are due to be dismissed.

4. This Order is conditioned upon the agreement of Precision Tune, Grimaud Enterprises, Grimaud and Garies that they shall not object or raise the defenses of lack of jurisdiction, improper venue and/or statute of limitations to any specific causes of action asserted in the

venue of Loudown County, Virginia, which were brought against the named defendants in the present action pending in the Circuit Court for Madison County, Alabama. Nothing contained herein shall limit the right of Precision Tune, Grimaud Enterprises, Grimaud and Garies to object or raise any appropriate defense, including, without limitation, lack of jurisdiction, improper venue, statute of limitations, to any causes which were not specifically asserted by the plaintiffs in this present action. The waiver described in this paragraph shall be valid and enforceable for a period of 120 days form the date of this Amended Order of Dismissal. At any time more than 120 days from the date of this Amended Order of Dismissal, the waiver described herein above shall be null and void and unenforceable under the terms and conditions of this Amended Order of Dismissal.

5. The above-described waiver by Precision Tune, Grimaud Enterprises, Grimaud and Garies of the defense of statute of limitations shall be effective for the 120 days following the date of the entry of this Amended Order of Dismissal. Therefore, any and all causes of action filed by the Frakes within 120 days of the date of this Amended Order of Dismissal in a court of competent jurisdiction in Loudoun County, Virginia, which were also asserted in this action, shall not be subject to the defense of statute of limitations and Precision Tune, Grimaud Enterprises, Grimaud and/or Garies hereby waive any such defense. However,

should the Frakes assert any cause or causes of action against Precision Tune, Grimaud Enterprises, Grimaud and/or Garies in Loudoun County ,Virginia more than 120 days from the date of this Amended Order of Dismissal, then any such cause or causes of action asserted by the Frakes against Precision Tune, Grimaud Enterprises, Grimaud and/or Garies in such action shall be subject to the defense of statute of limitations, if applicable, and any waiver of such defense by Precision Tune, Grimaud Enterprises, Grimaud and/or Garies to any such cause or causes of action shall be null and void.

6. The Order of Dismissal entered by this Court on May 16, 2002, is hereby withdrawn. This Amended Order of Dismissal shall supercede the Order of Dismissal, previously entered in this matter.

It is, therefore, ORDERED, ADJUDGED, and DECREED that the Second Amended Motion to Dismiss of Defendant Precision Tune, Inc. and the Second Amended Motion to Dismiss of Defendants John Garies, William Grimaud and Grimaud Enterprises, Inc., are due to be, and are hereby, GRANTED, and final judgment is hereby entered against Plaintiff dismissing *without prejudice* each of the counts and claims for relief asserted in the Plaintiff's Complaint, Amended Complaint, and Second Amended Complaint.

DONE and ORDERED this the 22nd day of May, 2002.

s/Laura W. Hamilton
Honorable Laura W. Hamilton
Circuit Judge Presiding